



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Imperial Maintenance, Inc.
File: B-224257
Date: January 8, 1987

DIGEST

1. Letter to a contracting agency which does not use the word "protest" but conveys dissatisfaction with the agency's proposed rejection of a bid and requests that agency reconsider its position constitutes a protest to the agency.
2. Where an irrevocable letter of credit submitted as a bid guarantee is a photocopy; is addressed to the bidder rather than the agency; and does not specifically state the terms and conditions upon which the agency can make a demand on the bank issuing it, the letter is of questionable enforceability, and the bid therefore is properly rejected as nonresponsive.

DECISION

Imperial Maintenance, Inc., protests the rejection of its low bid for interior and exterior painting of family housing units at the Naval Air Station, Kingsville, Texas, under invitation for bids (IFB) No. N62467-86-B-9764. The Navy rejected the bid because it found Imperial's bid bond, in the form of a letter of credit, to be materially defective.

We deny the protest.

The IFB, issued June 27, 1986, required each bidder to submit a bid guarantee in the amount of 20 percent of the total bid price. In accord with the applicable Federal Acquisition Regulation (FAR) provision, 48 C.F.R. § 52-228-1 (1985), it stated that failure to furnish a guarantee in the proper form and amount by the July 28 bid opening might be cause for rejection of the bid.

Imperial submitted with its bid a photocopy of an irrevocable letter of credit issued by the State Bank of Kingsville on July 25. The letter, in the amount of \$16,000, referenced the correct solicitation number and the Naval Air Station at

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Kingsville; it further stated that it would be in force for 6 months or "until a performance and payment bond is issued and the bank receives a release from the U.S. Navy." It was, however, addressed to Maria Deleon, doing business as Imperial Maintenance, rather than to the Navy.

The record indicates that on August 12, i.e., after bid opening, Imperial wrote the contracting officer, claiming a mistake in bid that would have reduced its already-low bid by slightly more than \$1,000 and setting forth arguments apparently intended to address concerns expressed by the Navy over the fact that a photocopy, rather than an original letter of credit, had been submitted as the firm's bid guarantee. By letter dated September 16, however, the Navy informed Imperial that it was rejecting the bid as nonresponsive, having determined that the letter of credit was deficient on several grounds: it was made out to the bidder; it did not specifically authorize the government to draw against it in the event of a default; and it did not clearly show that upon presentation of the photocopy, the bank would reimburse the government.

By letter to the contracting officer dated September 17, the bank responded that if, upon default of Imperial, either the original or a copy of the letter of credit were presented to it, the Navy would be able to draw on it up to \$16,000. It is not clear when the Navy received this letter; however, on September 18 it awarded an \$81,852 contract to JCO, Inc., the incumbent contractor. Apparently unaware of the award, Imperial, by letter dated September 24, requested the Navy to reconsider its rejection, arguing that the fact that the letter was addressed to the bidder was a minor informality; that the Navy was the obvious beneficiary; and that the letter had clearly been issued for the purpose of guaranteeing the bid. Imperial concluded that the deficiencies, if any, in the instrument were therefore not so great as to render its bid nonresponsive.

Imperial repeats the same arguments in its protest to our Office, filed October 2. The firm also alleges that the September 18 award was contrary to an earlier Navy statement that it would not make award until October 1, when funds became available. This action, the firm argues, constituted bad faith. Imperial seeks termination of the JCO contract and award to itself.

The Navy initially argues that Imperial's protest to our Office is untimely, since it was not filed within 10 working days after September 17, when the protester received notice that its bid had been rejected. Imperial, however, argues that its letter of September 24 should be construed as an agency-level protest, making its subsequent protest to our Office timely. We agree with the protester. Although the September 24 letter did not use the word "protest," it clearly contained an expression of dissatisfaction (Imperial objected to the rejection of its bid) and a request that the agency reconsider its position. These are the elements of a protest. Small Business Systems, Inc., B-213009, July 26, 1984, 84-2 CPD ¶ 114; Applied Devices Corp., B-203241, Sept. 9, 1981, 81-2 CPD ¶ 207. Since our Bid Protest Regulations, 4 C.F.R. § 21.1(a)(3) (1986), provide that matters originally protested to the contracting agency will be timely if protested to our Office within 10 days of the protester's actual or constructive notification of initial adverse agency action (here, when the protester learned of the award), we will consider the protest. However, for the reasons indicated below, we find it without merit.

The purpose of any bid guarantee, including a letter of credit, is to secure the liability of a surety to the government in the event the bidder fails to fulfill its obligation to execute a written contract and furnish payment and performance bonds. Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Thus, the sufficiency of a bid guarantee depends on whether the surety is clearly bound by its terms. When the liability of the surety is not clear, the guarantee properly may be regarded as defective, Desert Dry Waterproofing Contractors, B-219996, Sept. 4, 1985, 85-2 CPD ¶ 268, and the bid must be rejected as nonresponsive. A&A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463.

A letter of credit is essentially a third-party beneficiary contract. Upon request of its customer, a financial institution may issue such a letter to a third party, whose drafts or other demands for payment will be honored upon the third party's compliance with the conditions specified in the letter. The effect and purpose of a letter of credit is to substitute the credit of some entity other than the customer for the credit of the customer. See Chemical Tech. Inc., B-192893, Dec. 27, 1978, 78-2 CPD ¶ 438 and cases cited therein.

Here, the letter of credit submitted by Imperial was a photocopy; was addressed to the bidder rather than to the third party beneficiary, i.e., the Navy, and did not specifically state the terms and conditions upon which the

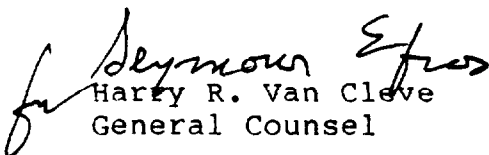
Navy could make a demand on the bank. The mere fact that it was a photocopy, in our opinion, is sufficient to render the instrument defective, since there would be no way (other than by an examination of the original) that the agency could be certain that there had not been alterations to which the bank had not consented. See Ameron, Inc., B-218262, Apr. 29, 1985, 85-1 CPD ¶ 485; Baucom Janitorial Service, Inc., B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356.

Considering all these facts and circumstances, we think it is doubtful whether the letter of credit could be enforced by the Navy. We therefore do not believe that the government would receive the full and complete protection it contemplated in drafting the IFB. Juanita H. Burns et al., 55 Comp. Gen. 587 (1975), 75-2 CPD ¶ 400.

Imperial's submission of a letter from the bank which indicates that the bank intended to be bound by the letter of credit cannot be considered, since a nonresponsive bid cannot be made responsive by actions taken after bid opening. When required, a bid guarantee is a material part of a bid and must, therefore, be furnished with the bid. Baucom Janitorial Service, Inc., supra. We conclude that the contracting officer properly rejected Imperial's bid as nonresponsive.

As for the alleged bad faith on the part of the Navy, Imperial has submitted no evidence supporting its assertion that the agency agreed not to make an award until October 1. Moreover, given that we find rejection of Imperial's bid was proper, Imperial could not have been prejudiced by the September 18 award to another firm in any event.

The protest is denied.


Harry R. Van Cleve
General Counsel